IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1087

TOBACCO WORKERS INTERNATIONAL UNION,
AFL-CIO, LOCAL 192,
Petitioner,

versus

EDGAR RUSSELL, FREDERICK D. BROADNAX,
ALVIS MOTLEY, JR., JAMES R. VAUGHN,
LAWRENCE PRICE, JR., GLEN A. LEE,
HAYWARD GILLIAM, AND JAMES R. KAYLOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice and the
Associate Justices of the Supreme Court of
The United States:

The Petitioner prays this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit to the end that this Court may review the decision which the said Court of Appeals has rendered in the above-entitled case. And the Petitioner respectfully shows to this Court:

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case has not yet been officially reported. The opinion of the United States District Court for the Middle District of North Carolina in this case is reported in 374 F. Supp. 286. Both the District and Court of Appeals opinions are included in the Appendix to this Petition.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fourth Circuit, which Petitioner now asks this Court to review, is dated the 24th day of September, 1975, and was entered by that Court on the same date. A timely Petition for rehearing was filed on the 17th day of October, 1975, and said motion was denied by Order of that Court on November 4, 1975.

Jurisdiction to review the decision of the Court of Appeals, through the procedure of the issuance of a Writ of Certiorari, is conferred upon this Court by the provision of 28 USC Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Petitioner, a labor union local, was ordered to pay back pay compensation to a defined class of workers by the District Court. Said order was affirmed by the Federal Court of Appeals for the Fourth Circuit on the basis that discriminatory practices were imbedded in the bargaining agreements negotiated by the union.

(1) Can the Petitioner be held liable for back pay costs

representing the years from July 2, 1965, through May 27, 1968, when the Respondents stipulated that Respondents made no contentions that they were denied an opportunity to attend and participate in those meetings of the local which were open to the general membership of the local or were denied any opportunity to nominate and vote for principal officers of the union or to nominate and vote for committee men to serve on the committee charged with the receiving and processing of the grievances of the members?

(2) Can Petitioner be held liable for back pay costs assessed for black machine operators who were bumped back from their jobs after October 25, 1968, because they had not reached the prevailing rate when these actions were taken under a bargaining agreement negotiated by representatives of the local and Respondents stipulated that said bargaining agreement was unanimously adopted by a vote of the members of the local at a duly called meeting held for the announced purpose of considering the adoption or rejection of said agreement?

(3) Can Petitioner be held liable for back pay assessments for individuals who did not attain supervisory positions when the Respondents stipulated that the selection and employment of foremen and assistant foremen was the exclusive right and responsibility of the company?

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

Title 7 of the Civil Rights Act of 1964, 42 USC Section 2000e-2 and § 2000e-5(g), upon which the Court of Appeals relies, reads in pertinent part as follows:

§ 2000e-2(c) – It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

§ 2000e-5(g) – If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

STATEMENT OF THE CASE

This case was brought pursuant to Title 7 of the Civil Rights Act of 1964, 42 USC Section 2000e et. seq. The judgment of the District Court was entered on March 8, 1974. Respondents below and Petitioner gave notice of appeal of this decision to

the United States Court of Appeals for the Fourth Circuit on April 3, and on April 17, 1974, respectively. The Defendant, American Tobacco Company, subsequently withdrew its appeal and this action was allowed by Order of the United States Court of Appeals for the Fourth Circuit entered on June 27, 1974. This case was argued before the United States Court of Appeals for the Fourth Circuit on January 7, 1975, and decided by that Court on September 24, 1975. Defendant then petitioned for a rehearing of this case on October 17, 1975. With some minor changes in its former opinion, the United States Court of Appeals for the Fourth Circuit denied said Petition for rehearing on November 4, 1975.

The Respondents in this case are black employees of Defendant, American Tobacco Company, at its plants located in the City of Reidsville and Rockingham County, North Carolina. The Defendant, American Tobacco Company, operates these two plants for the purposes of handling and processing leaf tobacco and the manufacturing and packaging of cigarettes. The subject matter of this case and the subsequent appeals concern employment practices of these two facilities. The Petitioner, Local 192, Tobacco Workers International Union, AFL-CIO, of which Respondents are members, represents hourly paid employees of the Defendant Company. A complaint was filed on January 5, 1968, in the U. S. District Court for the Middle District of North Carolina, Greensboro Division, alleging that Defendants were engaged in and had been engaged in discriminatory practices at the company's plants. Prior to the filing of the complaint, the Respondents had filed charges with the Equal Employment Opportunity Commission. Both Defendants moved to dismiss the action on the grounds that the complaint in the Court below had not been timely filed. Petitioner also moved to dismiss the action on the grounds that the Respondents had failed to join as party Defendants two other locals from Durham, North Carolina, and Richmond,

Virginia. These motions were denied on January 20, 1971. The Court allowed the action to proceed as a class-action under Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. After the trial and before the determination on the merits, Petitioner moved to amend its Answer to set forth a defense of estoppel on the grounds that the Respondents and members of their class had unanimously approved the 1971 collective bargaining agreement containing a seniority provision at issue in the case. The Court allowed the amendment on January 18, 1972. The case was tried before Judge Eugene A. Gordon on November 1-3 and 8-11, 1971. A memorandum opinion setting forth findings of fact and conclusions of law was entered by Judge Gordon on January 18, 1973. A copy of said memorandum opinion and order is included in the appendix herein. The decree entered on March 8, 1974, listed the individuals entitled to relief as follows: (1) All blacks employed by the company at "branch" prior to January 1, 1955, and who continued to be employed between January 2, 1965, and May 27, 1968, and who had been denied a promotion in preference to a junior white employee; (2) The class also included those blacks who had worked as machine operators for 35 or more days and who had been demoted from these jobs at any time from October, 1968. Following the decision rendered by the United States Court of Appeals for the Fourth Circuit, Petitioner received a Stay of Mandate pending the filing of a Petition for a Writ of Certiorari in this Court. The basis of this Petition concerns certain stipulations made by Respondents in Volume 2 of the joint Appendix-Exhibits which was filed with the United States Court of Appeals for the Fourth Circuit. Those stipulations are as follows: (1) Respondents make no contentions in this action that since July 2, 1965, black members of the local have been denied an opportunity to nominate and vote for principal officers of the local or that black members of the local have been denied the opportunity to nominate and vote for committee men to serve on the committee charged with receiving and processing

the grievances of the members; or that members of the local have been denied an opportunity to attend and participate in those meetings of the local which were open to the general membership of the local. (Stipulation "m" page 340 of the joint Appendix)

(2) The selection and employment of foremen and assistant foremen is the exclusive right and responsibility of the company. (Stipulation "p" page 340 of the joint Appendix)

(3) The collective bargaining agreements executed January 26, 1968, to be effective from January 15, 1968, with respect to both seasonal and regular employees, were unanimously adopted by vote of the members of the local at a duly called meeting held for the announced purpose of considering the adoption or rejection of said agreement. (Stipulation "r" page 340 of joint Appendix)

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The decision of the Fourth Circuit Court of Appeals in this case is based on the conclusion that the union arbitrarily bargained away the rights of the Respondents to secure fair employment from the Defendant, the American Tobacco Company, and that the employment agreement negotiated through the process of collective bargaining by the union was forced upon the Respondents against their will and in opposition to their express desires. These conclusions reached by the Fourth Circuit Court of Appeals are not only contrary to the facts as presented in the District Court, but also stand in direct opposition to evidence presented to the Fourth Circuit Court of Appeals in the form of stipulations in which Respondents freely concurred. The Fourth Circuit opinion considers the Respon-

dents to be disadvantaged union members who were unwillingly forced to acquiese to unfair employment conditions. In support of its decision to allow back pay awards in favor of the Respondents and the class they represent and against the Petitioner, the Fourth Circuit cites as authority the case of *Steele v. Louisville and Nashville R. R. Company*, 323 U.S. 192 (1944). An analysis of that case reveals a factual situation which is far different from the case which Petitioner now seeks to present to this Court. In *Steele*, the Plaintiffs were black employees of the Defendant Railroad who were systematically and conclusively excluded from membership in the Brotherhood of Locomotive Firemen and Engineermen, the exclusive bargaining agent recognized by the Railroad. The constitution and ritual of the Brotherhood totally excluded black workers from membership and, consequently, excluded them from having any voice or effective representation in the drafting and acceptance of bargaining agreements. The Brotherhood had negotiated a bargaining agreement which provided that:

> Only white firemen can be promoted to serve as engineers, and the notice proposed that only 'promotable,' i. e., white, men should be employed as firemen or assigned to new runs or jobs or permanent vacancies in established runs or jobs. [1]

These provisions would have ultimately excluded blacks from all the decent jobs covered in the agreement. These acts were obviously unlawful and rightfully struck down by this Court; but an analogy between the facts presented in *Steele* and those facts presented in Petitioner's case is simply not justified. In the present case, the Respondents have not been excluded from

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[1] Steele v. Louisville and Nashville R. R. Company, 323 U.S. 192, 195 (1944).

membership or participation in the union or its collective bargaining process. Quite to the contrary of the situation in *Steele* upon which the Fourth Circuit opinion relies, the Respondents in the present case stipulated to the Fourth Circuit that:

> Plaintiff makes no contention in this action that since July 2, 1965, black members of the local had been denied an opportunity to nominate and vote for principal officers of the local or that black members of the local have been denied the opportunity to nominate and vote for committee men to serve on the committee charged with receiving and processing the grievances of the members; or that members of the local have been denied an opportunity to attend and participate in those meetings of the local which were open to the general membership of the local. [2]

Thus, Respondents have not been excluded in any way from exercising their rights and expressing their opinions in officer elections, through grievance procedures, or at general union meetings.

The Fourth Circuit further cites *Robinson v. Lorillard Corporation,* 444 F. 2d 791, 792 (4th Cir. 1971) in favor of the proposition that a union and/or employer can not bargain away the right to fair employment. Petitioner asserts that it did not bargain away the rights of the Respondents and the class they represent. Quite to the contrary, Petitioner, as the recognized bargaining representative, did actually work and negotiate as a fair and equitable representative of all its workers. The agreements which Petitioner negotiated were presented to the membership

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[2]Stipulation (m) page 340 of joint Appendix.

as a whole, Respondents included, and the membership *unanimously* voted to adopt these agreements. Respondents confirmed these actions in the stipulations contained in the joint Appendix sent to the Court of Appeals for the Fourth Circuit. That stipulation was as follows:

> The collective bargaining agreements executed January 26, 1968, to be effective January 15, 1968, with respect to both seasonal and regular employees, were unanimously adopted by vote of the members of the local at a duly called meeting held for the announced purpose of considering the adoption or rejection of said agreements. [3]

When the membership unanimously approved the bargaining agreements, it can hardly be said that Petitioner failed to represent and protect the best interest of the minority employees. In *Thornton v. East Texas Motor Freight*, 497 F. 2d 416, 425 (6th Cir. 1974), the Court makes this finding:

> None of the plaintiffs ever filed a grievance against the company on account of its no-transfer rule, nor did the plaintiffs or any union member ever request the union to process a grievance against the company. This would indicate rather clearly that the union members, including the plaintiffs, were well satisfied with the collective bargaining agreements.
>
> Under these circumstances, the union could not be held liable for failure to perform duties under the agreement, such as the duty to represent fairly its members.

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[3] Stipulation (r) page 340 of joint Appendix.

As further evidence of the incorrectness of the Fourth Circuit's ruling which requires the Petitioner to pay back pay compensation, Petitioner had no power or authority to control the selection of foremen and assistant foremen, and yet the back pay assessment for individuals denied a promotion which Petitioner has been ordered to pay might well include these positions as the order now stands. The Respondents actually stipulated that:

> (p) The selection and employment of foremen and assistant foremen is the exclusive right and responsibility of the company.

It would seem manifestly unjust that Petitioner should be held responsible for circumstances involving supervisory positions when it had neither the right nor the power to appreciably effect any decisions in this regard.

CONCLUSION

The holding below, if allowed to stand, would undoubtedly subvert the credibility of validly elected union negotiators and lay bargaining agreements that were fairly and correctly ratified by union memberships open to needless and unjustified attacks. Also, if allowed to stand, the decision below would place a severely punitive financial burden on an organization that neither deserves such a burden nor could it successfully withstand its implementation. For the foregoing reasons, this Petition for a Writ of Certiorari should, therefore, be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Petition has been served upon counsel for the Respondents and counsel for the American Tobacco Company by depositing three (3) copies of said Petition in the United States mail, postage prepaid, and addressed to each of the following:

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This ____ day of January, 1976.